Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

JAMES H. RYAN *
WILLIAM C. IVES
Special Assistant State's Attorneys
DuPage County
MAUREEN MARTIN
KECK, MAHIN & CATE
8300 Sears Tower
Chicago, Illinois 60606
(312) 876-3400

Attorneys for Petitioners, The County of DuPage and The Board of Commissioners of DuPage County

GREGORY G. WROBEL *
MARY C. GILHOOLY
CHADWELL & KAYSER, LTD.
8500 Sears Tower
Chicago, Illinois 60606
(312) 876-2100

Attorneys for Petitioner, The Village of Lisle

RICHARD J. HOSKINS *
EDWARD J. FINN
SCHIFF, HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

MARVIN J. GLINK
ANCEL, GLINK, DIAMOND, MURPHY & COPE, P.C.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 782-7606

Attorneys for Petitioner, The Village of Woodridge

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

PAGE

I.

THE CASE INVOLVES A SUBSTANTIAL ISSUE OF FEDERAL LAW WHICH NEEDS TO BE DECIDED BY THIS COURT 2

II.

PLAINTIFFS' PARTICIPATION IN THE STATE COURT PROCEEDINGS WAS NEITHER UNWILLING NOR LIMITED 4

III.

PLAINTIFFS WRONGLY ASSERT THAT THE *CORPORATE WEST* CASE WAS NOT DECIDED ON ITS MERITS 6

IV.

FEDERAL DISTRICT JUDGES MUST BE PERMITTED TO APPLY FEDERAL LAW, IN THE ABSENCE OF DISPOSITIVE STATE PRECLUSION PRINCIPLES, TO PREVENT INTENTIONAL CLAIM-SPLITTING 7

V.

CONCLUSION 9

APPENDIX

I. Decision Order in *Corporate West Development, Inc. v. Illinois Environmental Protection Agency*, (Ill. App. Ct., 2d Dist. Dec. 11, 1987) I-1

J. Intervening Plaintiffs' Petition for Rehearing, dated January 4, 1988 ..... J-1

K. Order of the Illinois Appellate Court, Second District, Denying Plaintiffs' Petition for Rehearing, dated January 19, 1988 ..... K-1

L. Judgment of the Illinois Supreme Court Denying Plaintiffs' Petition for Leave to Appeal, dated June 3, 1988 ..... L-1

TABLE OF AUTHORITIES

Cases PAGE

Corporate West Development, Inc. v. Illinois Environmental Protection Agency, No. 79 MR 257 (Cir. Ct., DuPage Cty. Dec. 16, 1986), *aff'd*, No. 2-87-0043 (Ill. App. Ct., 2d Dist. Dec. 11, 1987), *petition for leave to appeal denied*, No. 66546 (Ill. S.Ct. June 3, 1988) 1, 4, 6, 8

Hagee v. City of Evanston, 729 F.2d 510 (7th Cir. 1984) 8

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 1, 3

Torres v. Rebarchak, 814 F.2d 1219 (7th Cir. 1987) 8

Statutes

28 U.S.C. §1738 3

42 U.S.C. §1983 ..... *passim*

Other Authorities

Shreve, *Preclusion and Federal Choice of Law*, 64 Tex. L. Rev. 1209 (1986) 3

Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59 (1984) 3

No. 88-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

Plaintiffs base their "Respondents' Brief In Opposition" on the following assertions:

(1) That defendants' Petition does not identify a federal question and seeks to undermine a case of unquestioned validity, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985);

(2) That plaintiffs were unwilling participants in the *Corporate West* state court proceedings;

(3) That plaintiffs litigated in that case only to the limited extent necessary to obtain relief from the August 13, 1980 state court order, allocating new sewer hookups;

(4) That those state court proceedings led to a decision against them which was not on the merits; and

(5) That defendants now unfairly seek to invoke that decision to deprive them, under the principles of *res judicata*, of the federal forum to which they are entitled for their $20,000,000 case based on 42 U.S.C. §1983.

If all of this were true, plaintiffs would have stated compelling reasons why this Court should deny defendants' Petition. None of these propositions is true, however. For the reasons set forth herein and in the Petition, the Petition should be granted to review and reverse the decision of the Court of Appeals.

I.

THE CASE INVOLVES A SUBSTANTIAL ISSUE OF FEDERAL LAW WHICH NEEDS TO BE DECIDED BY THIS COURT.

Plaintiffs misconstrue, intentionally or otherwise, the nature of the important federal question presented by this case. That question is not, as plaintiffs phrase it, whether *Marrese* is valid, nor is it "what preclusive effect a federal court should give to a final judgment rendered by a state court . . ." (Respondents' Brief at 10-11). Instead, this case presents the difficult, important federal question, which Chief Justice Burger predicted this Court would eventually face, of "how the District Court should proceed if it finds state law silent or indeterminate on the

claim preclusion question." 470 U.S. at 388. Since there is no Illinois case squarely on point,[1] state law here is unquestionably "silent or indeterminate" on this claim-splitting issue. How, then, should the District Court proceed?

Chief Justice Burger would, in a case such as this one, fashion and apply a federal *res judicata* and claim-splitting rule, reasoning that, in the absence of pertinent state court precedent, such a rule does not offend the principles of comity and federalism which underlie the Full Faith and Credit Statute, 28 U.S.C. §1738. 470 U.S. at 390.[2] Others suggest that the federal court should, as in a diversity case, sit as the state court and rule as it believes a state court *would* rule. Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59 (1984). *Cf.* Shreve, *Preclusion and Federal Choice of Law*, 64 Tex. L. Rev. 1209 (1986).

Chief Justice Burger's approach will better serve to protect the important federal interests of judicial economy inherent in established federal doctrines against claim-splitting, thus assuring plaintiffs the opportunity to litigate their asserted federal rights, while protecting defendants from harrassment by multiple suits. These doctrines should

---

[1] Plaintiffs' suggestion at page 13 of their Brief, that there are "literally hundreds of applicable cases", is surely facetious, since they cite none, nor can they cite even one which addresses a factual situation like this one. Likewise, their argument that defendants would have federal courts supplant state law (Respondents' Brief at 13) is based upon the faulty premise that state law exists which can be supplanted, when there is, in fact, no such law here.

[2] As discussed in defendants' Petition, Chief Justice Burger would preclude a party from asserting a claim "that he had a 'full and fair opportunity' to litigate in a prior action . . . ." *Marrese*, 470 U.S. at 390.

be applied to §1983 claims, creatures of federal law, when state law provides no clear rule of decision for the federal courts to follow. However, either Chief Justice Burger's approach or the diversity approach is more reasonable than, and preferable to, the approach taken by the Court of Appeals here.

The Court of Appeal's approach effectively forecloses the *res judicata* defense in a federal case following a related state court decision in the absence of an applicable state court *res judicata* precedent directly on point. It is an utter distortion of the principles of comity and federalism to read such an absurd result into the Full Faith and Credit Statute. The lower federal courts will be unable to dismiss from their dockets claims which should have been asserted in previous state court proceedings because there is no clear state court precedent sanctioning such dismissal. Defendants' Petition for Writ of Certiorari should be granted, and this case reversed, thereby giving Federal District Judges the ability to prevent the kind of abusive claim-splitting and forum shopping found here.

II.

PLAINTIFFS' PARTICIPATION IN THE STATE COURT PROCEEDINGS WAS NEITHER UNWILLING NOR LIMITED.

Plaintiffs intervened in the *Corporate West* case on October 10, 1980, seeking preliminary and permanent injunctive relief from the August 13, 1980 state court order. Rather than press that claim, however, they did virtually nothing for nearly four years, and that claim was dismissed as moot on May 13, 1984, with leave to amend (App. A-6).[3] On June 11, 1984, plaintiffs filed their amended

[3] Appendices A-H are bound in Defendants' Petition. Appendices I-L are bound herewith.

complaint therein, based on 42 U.S.C. §1983, alleging that the August 13, 1980 order violated their constitutional rights (under the fifth and fourteenth amendments to the U.S. Constitution) to procedural and substantive due process, equal protection and against a taking of their property without just compensation and claiming damages in the amount of $20,000,000 (App. F). Plaintiffs' amended complaint thus initiated, for all practical purposes, a new and quite different case, in which they sought the same relief as they seek herein, and which they thereafter aggressively pressed at all levels of the Illinois judicial system.[4]

The state trial court, by opinion dated December 16, 1986, dismissed plaintiffs' amended complaint, expressly finding on the record before it that plaintiffs had caused their own injury, if any, and that such injury was not related to any conduct by the defendants (App. G-4-6). Plaintiffs then appealed that ruling to the Illinois Appellate Court, which, on December 11, 1987, affirmed the trial court's dismissal of plaintiffs' §1983 claims (App. I). On January 4, 1988, plaintiffs petitioned the Illinois Appellate Court for rehearing (App. J), which petition was denied on January 19, 1988 (App. K). Thereafter, plaintiffs petitioned the Illinois Supreme Court for leave to appeal, which petition was denied on June 3, 1988 (App. L). Contrary to plaintiffs' assertions, this eight-year litigation odyssey in the Illinois courts, most recently in pursuit of $20,000,000 in §1983 damages, cannot be accurately de-

[4] As pointed out below in Section IV at p. 8, at the time in 1984 that plaintiffs filed their state court amended complaint, asserting for the first time therein claims under §1983 and for money damages, they could have amended their federal antitrust case, then pending, and added such claims, just as they finally did in 1987. Nothing compelled them to proceed in two forums at that time or thereafter.

scribed as a limited or unwilling effort to obtain relief from the August 13, 1980 order.

III.

PLAINTIFFS WRONGLY ASSERT THAT THE *CORPORATE WEST* CASE WAS NOT DECIDED ON ITS MERITS.

The state court decision clearly was on the merits. The trial court found, on the basis of the pleadings and evidence before it, that plaintiffs were never prohibited from exercising their rights under the 1979 permit, that they were never injured in fact in their rights under the 1979 permit because they were never actually refused the right to connect, that the plaintiffs' 1979 permit expired by its own terms thus extinguishing any rights thereunder and that for the foregoing reasons, the plaintiffs were never injured in fact, by the defendants, no justiciable issue was presented, and the plaintiffs had no standing to bring the action (App. A-6-7). The Illinois Appellate Court's affirmance was based on findings that plaintiffs had no intention, during the two-year period in which plaintiffs' 1979 sewer permit was in force, of constructing the permitted and necessary on-site interceptors, and no intention of seeking (and to this day have never sought) the sewer connection permits they claimed they were denied. The court found that these actions were conscious business decisions taken by plaintiffs, by their own admission, in response to a slow housing market, and were the cause of injury, if any, to the plaintiffs. The court found that defendants were not the cause of such alleged injuries (App. I).

Against this record,[5] and given how emphatically plaintiffs argued to the contrary in state court, their assertion

[5] Judge Plunkett's discussion and conclusion hereon is found at App. D-9.

here that the state court proceedings were not decided on the merits is surprising. Here is how plaintiffs themselves described the state court's decision in their petition for rehearing to the Illinois Appellate Court:

> In the instant case, while both the Court and defendants have labeled the issue addressed as "standing", the Court's Rule 23 Order does not find that Unity lacks standing in the traditional sense of whether plaintiff has alleged a sufficient interest in the outcome of the case to ensure that plaintiff has a real interest in the case. . . . That is, the Court and defendants made no attempt to show that Unity's interest in this case was insubstantial or theoretical. Rather, defendants argued, and this Court found, that Unity's allegations regarding *the proximate cause* of its injuries were not supported by the *evidence*. Thus, while the Court employed the rhetoric of "standing", it in fact proceeded to consider the "ultimate fact" of Unity's case: the proximate cause of its injuries.

(App. J-4-5) (footnote omitted) (emphasis original). Plaintiffs' assertion now that the state court decision was not "on the merits" is plainly wrong.

IV.

FEDERAL DISTRICT JUDGES MUST BE PERMITTED TO APPLY FEDERAL LAW, IN THE ABSENCE OF DISPOSITIVE STATE PRECLUSION PRINCIPLES, TO PREVENT INTENTIONAL CLAIM-SPLITTING.

Sandwiched in between two, full scale (zoning, water, sewer) conspiracy complaints filed in federal court in 1982 (antitrust) and 1987 (§1983), plaintiffs in 1984 brought a §1983 case in state court against the same defendants with respect to the same real estate development on the same site with the same claimed damages. Their state court amended complaint asserted the same four constitutional claims as herein, but based them only on the sewer ele-

ment. Plaintiffs lost the state court case, on the grounds that plaintiffs' injury, if any, was self-inflicted, and not caused by defendants.

The first question which *must* be asked, in applying federal or Illinois *res judicata* (or claim-splitting) law in this case, is: could plaintiffs have brought all of their §1983 claims in state court when they filed their amended complaint there in June of 1984, alleging what they *now* contend are only *some* of their §1983 claims? The answer to that question is yes: plaintiffs knew about the full, alleged conspiracy at least as early as 1982 when they described it in their original, antitrust complaint herein. Moreover, they had no §1983 claims pending in any court in 1984.

The next question is: could plaintiffs have brought all of their §1983 claims in federal court in 1984? That answer is also yes. The state court had dismissed their original complaint in the *Corporate West* case as moot, not on the merits, in May, 1984. At that time, plaintiffs were free to select the forum—state or federal—in which to prosecute their §1983 damage claims. They should have chosen only one; they are not entitled to both. Having first chosen a state forum, they cannot now claim they are also entitled to a federal one.

Since plaintiffs could have brought *all* of their §1983 claims against defendants in either state or federal court in the spring of 1984, both Illinois and federal law required that they do so in a single proceeding. *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984); *Torres v. Rebarchak*, 814 F.2d 1219 (7th Cir. 1987). Instead, they chose to bring some of their known §1983 claims in state court in 1984 and all of those claims in federal court in 1987. This is intentional claim-splitting—pure and simple—and ought never be tolerated in federal court. Moreover, there is no case in which the Illinois courts have tolerated such pleading abuses.

V.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully urge the Court to issue the requested writ for the purposes of (1) directing federal courts to apply federal law in the circumstances described hereinabove and in the Petition, and (2) reversing the Court of Appeals' decision herein, as clearly required by federal and state law.

Respectfully submitted,

JAMES H. RYAN *
WILLIAM C. IVES
Special Assistant
State's Attorneys
DuPage County
MAUREEN MARTIN
KECK, MAHIN & CATE
8300 Sears Tower
Chicago, Illinois 60606
(312) 876-3400

Attorneys for Petitioners, The County of DuPage and The Board of Commissioners of DuPage County

GREGORY G. WROBEL *
MARY C. GILHOOLY
CHADWELL & KAYSER, LTD.
8500 Sears Tower
Chicago, Illinois 60606
(312) 876-2100

Attorneys for Petitioner, The Village of Lisle

RICHARD J. HOSKINS *
EDWARD J. FINN
SCHIFF, HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

MARVIN J. GLINK
ANCEL, GLINK, DIAMOND,
MURPHY & COPE, P.C.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 782-7606

Attorneys for Petitioner, The Village of Woodridge

* Counsel of Record

Dated: March 6, 1989

APPENDIX

APPENDIX I

[This Order Is Not Precedential
And Not To Be Published]

No. 2-87-0043

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CORPORATE WEST DEVELOPMENT, INC., *Plaintiff,*

and

WILLIAM ALTER, SHELDON SIMBORG as Trustee of UNITY TRUST, JOSEPH ASH as Trustee of FAMILY UNITY TRUST, MILTON LEVENFELD as Trustee of DAVIS FAMILY TRUST, JOSEPH ASH as Trustee of RHONDA, MICHAEL, HARVEY, JONATHAN and JENNIFER TRUST, JOSEPH ASH as Trustee of R.L.A., M.J.A., H.L.A., J.B.A., and J.S.A. TRUST, PARTNERS IN A PARTNERSHIP NAMED UNITY VENTURES,

Intervening Plaintiffs-Appellants,

v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, MICHAEL MAUZY, Director of Illinois Environmental Protection Agency, COUNTY OF DUPAGE, VILLAGE OF LISLE, and VILLAGE OF WOODRIDGE,

Defendants-Appellees.

Appeal from DuPage County, Illinois.
No. 79 MR 257
Honorable Anthony M. Peccarelli, Judge Presiding.

ORDER PURSUANT TO SUPREME COURT RULE 23

This appeal arises from an order entered by the trial court dismissing plaintiffs' complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-619). Plaintiffs sought equitable relief and compensatory damages from defendants for conduct alleged as having deprived them of obtaining sewage disposal service for property plaintiffs were in the process of developing. The trial court dismissed plaintiffs' complaint for lack of standing. We affirm.

As the parties are well acquainted with the facts of this case, we refer to them only as necessary for an understanding of our disposition.

Plaintiffs, individuals and partners in a partnership named Unity Ventures (Unity), are the owners of three parcels of property located directly west of the village of Lisle (Lisle) and the village of Woodridge (Woodridge) in unincorporated Du Page County (county). Unity obtained this property with the intention of creating a development known as "Hobson Greene." Unity intended to develop the property in three separate phases described as units one, two, and three.

Prior to beginning its development, Unity undertook arrangements to construct a sewage disposal system. The property was located in an area serviced by public sewer pipes (public interceptors) connected to the Lisle-Woodridge Sewage Treatment Plant (plant). In order to ensure that the plant had sufficient capacity available to treat the sewage generated by the development, Unity engaged in a four-step plan for construction. As described in Unity's brief, the four steps included: (1) obtaining a permit from the Illinois Environmental Protection Agency (IEPA) allowing Unity to construct and operate sewage lines or on-site interceptors on Unity's property; (2) actually constructing the on-site interceptors; (3) obtaining building and connection permits from the county allowing Unity to build the dwellings and connect the on-site intercep-

tors to those dwellings; and (4) actually constructing the dwellings and connecting them to the on-site interceptors.

On January 31, 1979, Unity was issued an IEPA permit to construct and operate the on-site interceptors for unit two of the development. The permit had an expiration date of January 31, 1981, and construction of the on-site interceptors was to be completed by that time. The permit further specified that unit two of the development would generate sewage at the rate of 239,200 gallons per day design average flow, or 2,392 population equivalents (P.E.). In other words, the permit allowed Unity to construct on-site interceptors sufficient to connect homes and apartments housing 2,392 people producing 239,200 gallons of sewage per day. The county had previously certified that the plant had sufficient capacity to service that amount of sewage.

On May 31, 1979, after Unity obtained permission to construct the on-site interceptors, but prior to any actual construction, the IEPA placed the plant on "restricted status." This action was taken based upon the IEPA's determination that the plant was operating dangerously close to or above capacity. In the wake of this action, Corporate West Development, Inc., filed the original complaint in this proceeding seeking the right to connect its completed development.

Following an extended period of negotiations, the parties entered into an agreement regarding the amount of P.E. for which connection permits to the plant could be issued. The county, Lisle, and Woodridge subsequently agreed to a formula for allocating the available P.E. among themselves. On August 13, 1980, the trial court entered an order in accordance with the parties' agreement (August 13 order). The August 13 order provided that connection permits could be issued for a total of 400 P.E., to be allocated among the villages and the county as follows: Lisle, 38%; Woodridge, 34%; and DuPage County, 28%. The August 13 order further provided that if certain improvements were made in the quality of treat-

ment provided by the plant, connection permits could be issued for additional P.E. on a gradual basis. Furthermore, the August 13 order stated:

> "The County, the Village of Lisle and the Village of Woodridge agree to issue only those permits which shall not cause additional loading to exceed the allocations as set forth [in this order]."

The August 13 order was to remain in effect until the plant had adequate capacity to "accept all outstanding permitted loading."

Unity was not a party to the action and did not receive notice of either the entry of the August 13 order or the negotiations preceding its entry. However, as of August 13, 1980, Unity had neither begun construction of the on-site interceptors, nor applied for connection and building permits. At this time, there were just over five months left on Unity's IEPA permit. Once Unity learned of the August 13 order, Unity interpreted it to render its IEPA permit worthless. Unity arrived at this conclusion on the basis that its IEPA permit allowed construction of on-site interceptors to accommodate P.E. in excess of the maximum amount the county, Lisle, and Woodridge were permitted to issue connection permits for under the August 13 order.

On October 10, 1980, the court entered an order allowing Unity to intervene. Unity filed its intervening complaint seeking, *inter alia*, an order vacating the August 13 order, a declaration of its rights regarding its permits, and a preliminary and permanent injunction enjoining the IEPA and county from refusing to issue further connection permits.

On October 9, 1980, Unity filed a petition for variance with the Illinois Pollution Control Board (IPCB) seeking to extend the two-year limitation of its IEPA permit. In its petition, Unity stated that it had not begun construction of the on-site interceptors because of (1) "the slow down in demand for residential housing"; and (2) "the un-

certainties surrounding the Lisle-Woodridge Sewage Treatment Plant." The petition further stated that even if the on-site interceptors were constructed in time, "[b]ecause of the slowdown in the real estate housing market, the sanitary sewer extension would in all probability lie unused for the immediate future." The IPCB dismissed Unity's petition finding that the petition "lacked a sufficient allegation of hardship." This court reversed in an order entered pursuant to Supreme Court Rule 23 (73 Ill. 2d R. 23), and remanded the case for hearing. On remand, the IPCB entered an order denying Unity's petition on the grounds that (1) the petition had expired as a result of an improper transfer; and (2) Unity had failed to prove that it would suffer an "arbitrary or unreasonable hardship" if the variance were not granted. This court affirmed the IPCB's decision. *Unity Ventures v. Pollution Control Board* (1985), 132 Ill. App. 3d 421, 435.

On January 31, 1981, while the variance proceeding was pending, Unity's IEPA permit expired on its own terms. As of that date, Unity had not begun construction on the on-site interceptors for unit two, nor had Unity requested connection or building permits from the county for that part of the development.

In the meantime, the county, Lisle, and Woodridge answered Unity's complaint in the instant case. These defendants admitted that the August 13 order had been entered without notice to Unity, and in response to Unity's allegations that the effect of the order was to bar Unity's use of the plant, stated that those allegations were "conclusions of the pleader" only. On February 2, 1981, the IEPA filed a motion to dismiss arguing, *inter alia*, that Unity had no standing to pursue this action. That motion was denied. In its subsequent answer the IEPA admitted that the August 13 order had been entered, but neither admitted nor denied Unity's allegation that the affect of the order was to bar Unity's use of the plant.

On January 3, 1983, the IEPA filed a second motion to dismiss arguing that Unity's claims were moot as a

result of the anticipated completion of a new sewage treatment plant (Greene Valley). Although holding that the case was not moot, the court noted that it might become moot.

On April 27, 1984, the IEPA moved to dismiss Unity's intervening complaint on the grounds of sovereign immunity and mootness. The IEPA's motion alleged that the connection limitations were no longer in effect as a result of the completion of the Greene Valley plant. On May 14, 1984, the trial court entered an order lifting the August 13 order.

On June 11, 1984, Unity filed its amended complaint seeking a declaration that its IEPA permit was in full force, an injunction prohibiting defendants from interfering with Unity's attempt to make connections, and damages. Defendants moved to dismiss Unity's amended complaint alleging, *inter alia*, that Unity lacked standing to bring its action. On August 8, 1985, the court dismissed Unity's amended complaint without prejudice based upon its conclusions that there were no equitable issues and that the case properly belonged in the law division. The court subsequently granted Unity's motion to vacate or amend the order of August 8, 1985, and Unity was given leave to file an amendment striking its requests for injunctive relief. The case was subsequently transferred to the law division.

On November 26, 1985, defendants moved to dismiss Unity's amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-619). The grounds asserted for dismissal were that (1) Unity did not have standing to sue since it allowed the permit to expire on its own terms; (2) the cause of action was barred by final judgments in collateral proceedings; and (3) the action had not been brought within the time limited by law. The IEPA was voluntarily dismissed prior to a decision on this motion.

On November 19, 1986, the trial court issued a letter opinion to counsel on defendants' motion to dismiss stating in pertinent part:

"It is clear from the pleadings, motions and documents submitted in this cause that Unity was never prohibited from exercising its rights under the 1979 permit to connect to the Lisle and Woodridge Plant. During the existence of the permit, Unity neither obtained a judicial or administrative judgment as to the status of the 1979 permit nor attempted to actually connect its sanitary system to the Lisle and Woodridge plant.

* * *

Unity was never injured in fact in its rights under the 1979 permit because Unity was never actually refused the right to connect. In fact, during the existence of the permit, the structural work necessary to connect with the Lisle and Woodridge Plant had not even been started.

The 1979 permit expired on its own terms on January 31, 1981 extinguishing Unity's rights thereunder.

Unity was never injured in fact, no longer has rights in the 1979 permit which could presently be exercised, no justiciable issue [*sic*] and has no standing to bring this action.

The issue of standing being dispositive there is no reason to consider other arguments in support of the Motion to Dismiss.

The Motion to Dismiss under § 2-619 of the Illinois Code of Civil Procedure is granted."

On December 16, 1986, the trial court entered an order in accordance with its letter opinion. Unity has filed this timely appeal.

At issue on appeal is whether the trial court improperly granted defendants' section 2-619 motion to dismiss on the grounds that Unity lacked standing since any injury it suffered was self-inflicted. Unity first challenges the posture in which the court reached its decision arguing that defendants' motion challenging Unity's standing does nothing more that "improperly offer evidence to refute a well pleaded fact." We disagree.

Section 2-619(a)(9) provides in pertinent part:

> "Involuntary dismissal based upon certain defects or defenses.
>
> (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * *
>
> (9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." (Ill. Rev. Stat. 1985, ch. 110, par. 2-619(a)(9).)

The alleged affirmative matter asserted under a section 2-619(a)(9) motion must be something more than evidence offered to refute a well-pleaded fact since all well-pleaded facts are to be taken as true. See *First National Bank v. Minke* (1981), 99 Ill. App. 3d 10, 13.

While it is true that in construing a motion to dismiss all well-pleaded facts in the plaintiff's complaint are to be taken as true, this presumption does not apply to conclusions of fact or law. (*Stiefel v. Illinois Union Insurance Co.* (1983), 116 Ill. App. 3d 352, 355-56.) In *Stiefel*, the plaintiff's "allegation that he 'reasonably believed' any possible claim had been forsaken and abandoned" was held to be a conclusion, and, therefore, was not admitted as true in a motion on the pleadings. 116 Ill. App. 3d at 356.

In the instant action, Unity alleges that (1) the August 13 order "had the effect of extinguishing Unity's rights under its January 31, 1979 permit and had the effect of preventing Unity's lawful development of Hobson Greene"; (2) "[a]s a result of the August 13, 1980 order, Unity has been unable to begin construction of the sewer lines and facilities for Unit Two, and thus has been unable to proceed with the second phrase [*sic*] of the Hobson Greene development"; and (3) "[a]s a result of its inability to begin

said construction, Unity's January 31, 1979 permit expired on January 31, 1981." We believe these allegations regarding the legal effect of the August 13 order constitute conclusions rather than well-pleaded facts, and should not be taken as true for the purposes of a section 2-619 motion.

Unity's conclusions purport to establish its "injury" and basis for standing on this claim. This court has held that a showing of plaintiff's lack of standing may be a basis for dismissal pursuant to section 48(1)(i) of the Civil Practice Act (now section 2-619(a)(9) of the Code of Civil Procedure). (*Hermes v. Wm. F. Meyer Co.* (1978), 65 Ill. App. 3d 745, 747. See also *In re Marriage of Musa* (1982), 103 Ill. App. 3d 189, 191; *Smith v. St. Therese Hospital* (1980), 87 Ill. App. 3d 782, 784-85.) Accordingly, we believe that the trial court did not err in entertaining a motion to dismiss on these grounds.

We are left to determine whether the trial court correctly found that Unity lacked standing in the instant action. The basis for the trial court's finding in this regard was that "Unity was never injured in fact in its rights under the 1979 permit because Unity was never actually refused the right to connect." The court further noted that "during the entire existence of the permit, the structural work necessary to connect with the [plant] had not even been started." Thus, the question becomes whether Unity's inaction was fatal to its standing. The trial court correctly held that it was.

Essentially, Unity argues that defendants' agreement, culminating in the August 13 order, placed a limitation on the number of connection permits that could be issued at a level lower than the number needed by Unity to connect all of the structures it intended for unit two of its development. Unity contends that the August 13 order effectively barred Unity from developing its property to the potential to which it was entitled under the IEPA construction and operation permit. Citing our decision in *Village of Lake in the Hills v. Laidlaw Waste Systems, Inc.* (1986), 143 Ill. App. 3d 285, Unity asserts that its

inability to develop its property to its fullest potential and the costs associated with the delays caused by defendants' agreement are precisely the types of direct injury to its property and rights which are required to establish standing. We disagree.

In *Village of Lake in the Hills*, we held, after noting that a plaintiff must allege a direct injury to his property or rights, that the village did not have standing to challenge a proposed landfill site since it did not own the property on which the site was to be located, nor did it allege or prove any special damages it might suffer to its property interests. (143 Ill. App. 3d at 294.) We note that in the instant case, Unity has alleged that defendants' conduct has damaged property owned by Unity. However, the constitutional test for standing focuses on whether a plaintiff has suffered some actual or threatened injury that can fairly be traced to the challenged action of the defendant. (*Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.* (1982), 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed. 2d 700, ____; *Wade v. Dole* (N.D. Ill. 1986), 631 F. Supp. 1100, 1105. See also *People v. Lee* (1981), 99 Ill. App. 3d 630, 635.) In order to satisfy the jurisdictional prerequisite of standing, the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged conduct, and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Palmer v. City of Chicago* (N.D. Ill. 1985), 755 F.2d 560, 570.

We do not believe that Unity's "inability" to develop its property is either traceable to defendants' actions or real and immediate enough to confer Unity standing in this case. The record indicates that it was Unity's conduct, rather than defendants, that was responsible for Unity's failure to develop its property.

We note that Unity obtained its IEPA permit allowing it to construct on-site interceptors for its property on January 31, 1979. The plant was not placed on restricted

status until four months later. Yet, at the time the plant was placed on restricted status, Unity had not begun construction on the on-site interceptors. In addition, defendants' challenged conduct did not occur until more than 18 months had elapsed on Unity's IEPA permit. Yet, despite the IEPA permit's approaching expiration date, Unity had not begun construction on the on-site interceptors. The record clearly indicates that Unity's inaction was a conscious business decision in response to a slow housing market. In its petition for variance filed with the IPCB on October 9, 1980, just over 20 months after the issuance of the IEPA permit, Unity sought an extension of the two-year limitation stating that it had not begun construction due to the substantial decrease in the demand for housing and the uncertainties regarding the status of the plant. In fact, the petition further stated that even if Unity was able to utilize "extreme measures" to complete the on-site interceptors in time, "*[b]ecause of the slowdown in the real estate housing market* the sanitary sewer extension would in all probability lie unused for the immediate future." (Emphasis added.)

From these facts it is apparent that (1) Unity had no intention of constructing the on-site interceptors prior to the expiration of its IEPA permit; and (2) even if Unity had been able to construct the on-site interceptors within the time remaining on its IEPA permit, it had no intention of seeking the connection permits which it claims it was denied. Such concessions have been found to preclude a finding of standing on the basis that the alleged injury is merely conjectural. (See *Friedrich v. City of Chicago* (N.D. Ill. 1985), 619 F. Supp. 1129, 1146-47 (street performers challenging a city ordinance banning performances at certain times and in certain areas did not suffer a direct and real injury and did not have standing since they acknowledged that none of the performers "has performed or desires to perform" in the areas and at the times banned).) The record demonstrates that Unity did not suffer any adverse effects as a result of *defendants'* conduct. Absent such a showing, Unity does not have standing to challenge

defendants' conduct. See *222 East Chestnut Street Corp. v. Board of Appeals* (1956), 10 Ill. 2d 132, 136.

Moreover, the record indicates that Unity in fact never sought and was, therefore, never refused the building and connection permits which it has alleged it was denied. Thus, it is apparent from the record that any "injury" Unity suffered as a result of defendants' agreement to limit the issuance of connection permits is merely hypothetical. See *Rathe v. Stamper* (1966), 75 Ill. App. 2d 265, 270 (plaintiff did not have standing to challenge a statute setting forth examination requirements for licensing funeral directors since plaintiff failed to allege that he sought a license or was otherwise engaged in conduct for which a license was required). See also *Brown v. McGarr* (N.D. Ill. 1984), 583 F. Supp. 734, 736 (attorney who was otherwise not eligible for admission to the Federal bar lacked standing to challenge the legality of the application fee requirement since he could not show injury to himself as a result of that requirement's imposition).

Unity's failure to begin construction on the on-site interceptors for more than a year and one-half *before* defendants' challenged conduct and the reasons stated for this delay in Unity's petition for variance support the trial court's decision that it was not defendants' conduct which caused Unity's "injury," but rather Unity's own inaction. Having failed to show a direct injury which is fairly traceable to defendants' challenged conduct, we conclude that Unity lacked standing to maintain this action.

In reaching this decision we are mindful of Unity's argument that requiring it to have built the on-site interceptors or apply for connection permits in order to have standing would be improper since these would be "worthless acts" which are not required by law. Unity correctly states that the law does not require the performance of a useless act. (*Moehling v. Pierce* (1954), 3 Ill. 2d 418, 423; *Rock Island YWCA v. Bestor* (1977), 48 Ill. App. 3d 761, 765.) Unity states that "under the agreed order, Unity's rights were far from certain." Unity later states

that "the August 13 agreed order absolutely barred Unity from constructing any homes in its development and from connecting any home in its development to those on-site interceptors." Unity concludes that "[f]aced with these absolute bars to proceeding with its development, it would have been a complete and utter waste of money for Unity to have constructed interceptors which it could not use." However, Unity's conclusion that the performance of these acts would have been useless is not supported by the record.

The agreed order in controversy was entered in a case in which Unity was not a party. We note that Unity cites our supreme court's decision in *North Shore Sanitary District v. Pollution Control Board* (1976), 62 Ill. 2d 385, 391, wherein the court stated that the right of permit holders to connect their developments to the district's sewage facilities could not be abridged by subsequent limitations without those permit holders being given notice and an opportunity to be heard. However, our analysis of *North Shore Sanitary District* indicates that the permit holders in that case held previously issued "connection permits" rather than the construction permit held by Unity in the instant action. 62 Ill. 2d at 390.

Furthermore, Unity's IEPA permit merely gave it the right to construct the on-site interceptors. The IEPA permit, although issued on the county's certification that the plant could handle the sewage that would be produced by Hobson Greene, does not give Unity an absolute entitlement to connection or building permits issued by the county. Moreover, Unity's useless act argument is particularly without merit in light of the fact that Unity took no steps to construct the on-site interceptors *prior* to defendants' challenged conduct and affirmatively stated that were it to do so, the on-site interceptors would in all probability not be used. In any case, Unity never sought and was never refused any connection permits.

Therefore, we find that the record adequately supports the trial court's finding that it was Unity's inaction, rather

than defendants' conduct that caused Unity's injury. Absent a real injury traceable to defendants, the trial court correctly held that Unity lacked standing.

Accordingly, we affirm the decision of the trial court dismissing Unity's complaint for lack of standing.

Affirmed.

INGLIS, J., LINDBERG, P.J., REINHARD, J.

APPENDIX J

[Cover, Table of Contents, and
Table of Authorities omitted in printing]

No. 87-43

APPEAL TO THE
APPELLATE COURT OF THE STATE OF ILLINOIS
SECOND JUDICIAL DISTRICT

CORPORATE WEST DEVELOPMENT, INC.,
Plaintiff,

and

WILLIAM ALTER, et al.,
Intervening Plaintiffs-Appellants,

vs.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees.

No. 79 MR 257
The Honorable Anthony M. Peccarelli, Judge Presiding

INTERVENING PLAINTIFFS' PETITION FOR REHEARING

Pursuant to Illinois Supreme Court Rule 367, intervening plaintiffs Unity Ventures, et al., ["Unity"] petition this Court for rehearing and reconsideration of its Order entered December 11, 1987. In support of its petition, Unity states as follows.

SUMMARY OF POINTS MISCONSTRUED BY THE COURT WHICH WARRANT RECONSIDERATION

Unity submits that this Court's Rule 23 Order entered on December 11, 1987 improperly expands the scope of Rule 2-619 by resolving contested issues of fact at the pleading stage and without providing Unity with notice that these factual disputes would be considered, thereby depriving Unity of an opportunity to submit evidence in opposition to the "facts" which this Court found uncontested. In particular, one of the central issues in this case is that of proximate cause: Did Unity voluntarily abandon its proposed Hobson Greene development or was Unity's failure to proceed with its development proximately caused by defendants' wrongful acts leading to entry of the August 13, 1980 *ex parte* Agreed Injunction Order? Unity submits that this is a classic question of proximate cause—an issue which cannot be resolved on a Section 2-619 motion but must be decided by the jury at trial.

In Section I below, Unity discusses the proper scope of a Section 2-619 motion. In Section II below, Unity discusses the facts in the record which, assuming *arguendo* that the Court can properly reach the issue of proximate cause on a Section 2-619 motion, demonstrate that the Court wrongly concluded that Unity's injury was not proximately caused by defendants' wrongful conduct.

I.

THE COURT'S ORDER IMPROPERLY RESOLVED DISPUTED FACTUAL ISSUES REGARDING THE PROXIMATE CAUSE OF UNITY'S INJURIES

The Court properly sets out the limitations inherent in a Section 2-619 motion (Order at 11):

> The alleged affirmative matter asserted under a section 2-619(a)(9) motion must be something more than evidence offered to refute a well-pleaded fact since all well-pleaded facts are to be taken as true.

However, in the remainder of the opinion, the Court seems to abandon this limitation on the scope of a Section 2-619(a) motion and in fact proceeds to consider the facts central to plaintiffs' case-in-chief—what was the proximate cause of Unity's failure to proceed with its development—rather than any "affirmative matter" which would be the proper subject of a Section 2-619 motion.

The very cases cited by the Court in its Rule 23 Order demonstrate the impropriety of resolving this type of proximate cause issue in a Section 2-619 motion. For example, in *Smith v. St. Therese Hospital*, 87 Ill.App.3d 782, 410 N.E.2d 219 (2nd Dist. 1980), this Court specifically rejected use of a Section 2-619 motion as a means of resolving a dispute over the proximate cause of plaintiff's injuries. In *Smith*, plaintiff alleged that she had been injured by an adverse reaction to a drug she had been administered while hospitalized. She named as defendants her doctor, the hospital, and a number of companies which manufactured the drug in question, although plaintiff *admitted* that she did not know which company manufactured the dose of the drug which caused her injury.

Following limited discovery, one of the manufacturers moved for judgment pursuant to Section 2-619 relying upon plaintiff's answers to interrogatories in which she tentatively identified another company's product as the drug which *might* have been given to her. Based upon this limited evidence, the moving defendant in *Smith*, like defendant in the instant case, argued that it was not the proximate cause of plaintiff's injuries.

The Court rejected defendants' argument. The Court first set forth the proper scope of a Section 2-619 motion (410 N.E.2d at 222):

> [T]he main purpose of section [2-619] is to provide a means of disposing of issues of law or of easily proved issues of fact. * * * If it cannot with reasonable certainty be determined from the record then before the court that the alleged defense exists, the motion should not be allowed on that ground. Where the

> matter alleged in defense is nothing more than evidence upon which a defendant expects to contest a material fact stated in the complaint, to dismiss under section [2-619] is improper.

The Court then held that defendant's motion in *Smith* improperly sought to resolve one of the central issues in the case: which company had manufactured the particular drug involved (410 N.E.2d at 222):

> [Defendant's] motion does not raise an affirmative defense, but merely seeks to controvert the allegations of the ultimate fact against this defendant made in plaintiff's complaint.

The other cases cited by the Court in its Rule 23 Order similarly distinguish between affirmative defenses (which are properly raised in a Section 2-619 motion) and motions which merely seek to disprove one or more elements of plaintiff's cause of action (*e.g.*, duty, breach of duty, proximate cause, injury, etc.) which are not proper subjects for a Section 2-619 motion. See, for example, *Davis v. Weiskopf*, 108 Ill.App.3d 505, 439 N.E.2d 60, 63 (2nd Dist. 1982) ("Defendant's motion and affidavit, however, did not admit the facts as stated in the complaint, but, instead, challenged them offering his contrary version * * * ") and *Michigan Avenue National Bank v. State Farm Insurance Companies*, 83 Ill.App.3d 507, 404 N.E.2d 426, 430 (1st Dist. 1980) ("[D]efendants' contention * * * does not raise an affirmative defense but simply goes to negate substantial allegations of ultimate fact in the complaint and this is not the proper purpose of a section [2-619] motion").

In the instant case, while both the Court and defendants have labeled the issue addressed as "standing", the Court's Rule 23 Order does not find that Unity lacks standing in the traditional sense of whether plaintiff has alleged a sufficient interest in the outcome of the case to ensure that plaintiff has a real interest in the case. The traditional "standing" test is set forth in *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (cited by the Court

in its Rule 23 Order at 14), in which the Supreme Court held that plaintiffs which challenged transfer of public land to a religious institution had not alleged any injury different from the injury suffered by the population at large:

> The federal courts have abjured appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders.

In this case, Unity clearly alleged that it intended to develop its property but was stopped from doing so by entry of the August 13, 1980 *ex parte* Agreed Injunction Order. This allegation clearly sets Unity apart from the general public and alleges precisely the sort of individualized harm the Supreme Court found lacking in *Valley Forge*. Unity is clearly much more than a "concerned bystander" in this dispute.

Neither this Court nor the defendants argued that Unity lacked standing in this sense of not having alleged an individualized injury to set it apart from other "concerned bystanders". That is, the Court and defendants made no attempt to show that Unity's interest in this case was insubstantial or theoretical.* Rather, defendants argued, and this Court found, that Unity's allegations regarding *the proximate cause* of its injuries were not supported by the *evidence*. Thus, while the Court employed the rhetoric of "standing", it in fact proceeded to consider the "ultimate fact" of Unity's case: the proximate cause of its injuries.

As this Court clearly set forth in *Smith v. St. Therese Hospital*, 87 Ill.App.3d 782, 410 N.E.2d 219, 222 (2nd Dist. 1980), discussed at length above, proof of proximate cause forms part of plaintiff's cause of action; it is one of the

---

* The seven years and countless dollars Unity has devoted to its attempt to undo the damage imposed upon it by the August 13 *ex parte* Agreed Injunction Order belie any argument that Unity has no real interest in this case.

elements plaintiff must prove in its case in chief. Proximate cause is thus *not* an affirmative defense and this is *not* a proper subject of a Section 2-619 motion.

This Court should not be confused by defendants' attempt to invoke the magic label of "standing" and must recognize that defendants really seek to disprove one of the elements of Unity's case: proof that Unity was injured as a result of defendants' illicit entry of the August 13 *ex parte* Agreed Injunction Order. This Court must not permit defendants to use a Section 2-619 motion as a substitute for trial by improperly labeling the issue "standing" rather than "proximate cause".

II.

ASSUMING *ARGUENDO* THAT THE COURT CAN PROPERLY REACH THE ISSUE OF PROXIMATE CAUSE, THE COURT MISCONSTRUED THE EVIDENCE OF RECORD

Unity emphasizes that defendants did not support their Section 2-619 motion with a single affidavit, deposition, discovery response, or any other piece of affirmative evidence. Rather, this Court relied *solely* on what plaintiffs' respectfully submit is at best an ambiguous statement in an application plaintiffs filed in an unrelated administrative proceeding to defeat the clear allegations of proximate cause set forth in plaintiffs' complaint. Plaintiffs submit that this ambiguous statement simply does not prove that defendants' illicit conspiracy to obtain entry of the August 13, 1980 *ex parte* Agreed Injunction Order did not cause plaintiffs' injuries.

Based solely on this statement, the Court concluded, without a hearing, without reviewing a single deposition, affidavit, or any other piece of evidence, that, as a matter of law, defendants' wrongful conduct did not play any part in stopping Unity from proceeding with its development. On October 9, 1980, Unity filed a petition with the IEPA seeking an extension of its permit which was due to expire in 1981. In its application, Unity stated:

> In summary, because of the slowdown in demand for residential housing *and* the uncertainties surrounding the Lisle-Woodridge Sewage Treatment Plant, Unity has not preceeded to construct the sanitary sewer extension necessary to provide sanitary sewer service for Hobson Green Unit 2. (emphasis added)*

The Court's use of this statement is not supported by the law or the facts.

A.

The Court's Reliance On The Allegedly Conclusory Nature Of Plaintiffs' Allegations Of Proximate Cause Is Misplaced

The Court begins its analysis of this statement (Order at 11) by properly recognizing that a Section 2-619 motion may not be used to refute the well-pleaded allegations of the complaint. The Court then avoids this rule by labeling as "conclusory" plaintiffs' allegations of proximate cause. The Court then holds that a Section 2-619 motion *can* be used to contest factual "conclusions". Plaintiffs respectfully submit that the Court is wrong in both steps of its argument: plaintiffs' allegations are *not* overly "conclusory" and, even if the allegations were conclusory, they can *not* be attacked in a Section 2-619 motion.

1. Plaintiffs' Allegations Of Proximate Cause Are Not Overly Conclusory

The Illinois Supreme Court recently condemned the belabored attempts of defendants and the lower courts to label allegations as conclusions, facts, or evidence, stating

---

* This Court did *not* find, as defendants had urged, that the decision in these administrative proceedings was *res judicata* as to the instant action. As was discussed in plaintiffs' opening brief (pp. 36-39) the administrative proceedings were not "for the same cause" as the instant case and thus can have no preclusive effect in this case.

in *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 430 N.E.2d 1005, 1008 (1982):

> Pleadings are not intended to erect barriers to a trial on the merits but instead to remove them and facilitate trial * * *. Perhaps the best measure of a complaint's sufficiency, then, is whether the defendant is able to answer the essential allegations.

The Court then discussed the particular allegations at issue in *Carriage Way West.* The complaint, which alleged that defendants had conspired to fix prices in violation of the antitrust laws, did *not* list the dates on which particular defendants joined the price-fixing conspiracy, did *not* describe the particular actions by which each defendant joined the conspiracy, and did *not* identify the agents through which the corporate defendants acted. Nonetheless, the court held that the complaint was not overly conclusory (430 N.E.2d at 1009):

> The defendants claim that the complaint does not describe any specific act which evidenced the entry of any particular defendant into the conspiracy. But evidence need not be laid out in the complaint, *only the ultimate fact* that the defendants agreed to fix prices. The trial, not the pleadings, is the proper place to look for evidence of how and when the illegal agreement was made. * * * Such specifics as when, where, or through what agency defendants came to agree were not required in the complaint. (emphasis added)

The complaint in the instant case goes far beyond alleging the type of "ultimate facts" of proximate cause which *Carriage Way West* held were sufficient to properly state a claim. Instead, Unity set forth in detail its attempt to develop its property, described the entry of the August 13, 1980 *ex parte* Agreed Injunction Order (and attached a copy of the Agreed Order to the complaint), and described with specificity the effect the Agreed Order had on Unity's attempt to proceed with its development. These detailed allegations more than satisfy the Illinois Supreme Court's minimal requirement, set forth in *Car-*

riage Way West, that a plaintiff need only allege "ultimate facts".

2. Defendants Improperly Sought To Disprove The Ultimate Fact Of Proximate Cause In A Section 2-619 Motion

Even assuming that plaintiffs had alleged no more than the "ultimate fact" that their injuries were caused by defendants' illicit entry of the August 13, 1980 *ex parte* Agreed Injunction Order, the very cases relied on by this Court in its Rule 23 Order demonstrate that defendants may not challenge even "ultimate facts" in a Section 2-619 motion. For example, in both *Smith v. St. Therese Hospital*, 87 Ill.App.3d 782, 410 N.E.2d 219, 222 (2nd Dist. 1980) and *Michigan Avenue National Bank v. State Farm Insurance Companies*, 83 Ill.App.3d 507, 404 N.E.2d 426, 430 (1st Dist. 1980), discussed in Section I above, the court specifically held that it is improper to seek to disprove allegations of "ultimate fact" in a Section 2-619 motion.

Plaintiffs respectfully submit that the propriety of a Section 2-619 motion is not judged by looking at the specificity of the factual allegations at issue; rather, the motion is proper if it raises *affirmative* matters and improper if it seeks to disprove some element of plaintiffs' case. This Court's opinion improperly addresses the issue of proximate cause—clearly *not* an affirmative matter but rather a central element in plaintiffs' case in chief.

B.

The Ambiguity Of The Evidence Relied On By This Court Forecloses Resolution Of The Issue Of Proximate Cause In A Section 2-619 Motion

This Court's opinion is based *exclusively* on the statements contained in Unity's petition for an extension of its permit. That petition, as the Court's opinion recognizes, identified *two* causes of Unity's failure to construct on-site interceptor for Unit Two *prior to* October, 1980:

(1) the August 13, 1980 *ex parte* Agreed Injunction Order and the events which preceded its entry *and* (2) the downturn in the economy.

Based on the proceedings in the trial court, Unity had no way of predicting the central role this petition would come to play. Defendants' brief in support of their motion did not cite this alleged "admission" (see def. br. at 9-10). Defendants offered no affidavit or other evidence which would support this Court's interpretation of Unity's petition. The trial court itself completely ignored this alleged "admission". Even defendants' brief *in this Court* failed to raise this argument.

Because of the failure of the defendants *or* the trial court to raise this issue, Unity was deprived of the opportunity to submit affidavits or other evidence to explain the obvious ambiguity in its petition. In contrast, in *every* case cited by this Court in its opinion—including those cases such as *Smith v. St. Therese Hospital*, 87 Ill.App. 3d 782, 410 N.E.2d 219, 222 (2nd Dist. 1980) in which the court concluded that defendant's Section 2-619 motion had been improperly granted, the trial court had considered affidavits, counter-affidavits, discovery responses, depositions, and, in some cases, had even held an evidentiary hearing. In this case Unity was completely deprived of an opportunity to make this type of record.

However, even if one sets aside the procedural unfairness, the statement included in Unity's petition for an extension of its permit simply cannot be read to support a finding of fact that defendants' illicit conduct played *no* part in causing Unity's injuries.

First, the petition *only* applied to Unit *Two* of Unity's proposed development. The complaint, in addition to its allegations of injury relating to Unit Two, *also* alleges that Unity was unable to obtain a permit for Unit *Three* as a result of the absolure bar imposed by the August 13, 1980 *ex parte* Agreed Injunction Order to the issuance of any further permits. Unity's petition is completely silent as to Unit Three and thus cannot be used to refute the specific allegations of harm set forth in the complaint.

Second, Unity's petition primarily focused on why Unity had not began construction prior to October, 1980. Obviously, the economy played some role in this delay, as the illicit Agreed Order had not been entered until August, 1980. However, nothing in the petition indicates that *but for* the entry of the August 13, 1980 *ex parte* Agreed Injunction Order Unity would have voluntarily let its permit lapse by not completing construction of the on-site interceptors *after* October, 1980.

Finally, even as to the period *before* October, 1980, Unity's petition clearly does *not* admit that defendants' actions played *no* part in Unity's failure to proceed. At best, Unity's petition states that there were *two* causes for its failure to proceed: the depressed economy *and* defendants' wrongful conduct. In other words, the petition clearly identifies defendants' wrongful conduct as *one* of the causes of Unity's failure to proceed. The fact that Unity's injuries may have, *in part*, resulted from Unity's own actions does not bar Unity's claim in its entirety. Illinois has rejected contributory negligence as an absolute bar and has adopted the comparative fault rule. *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981). Therefore, even if it were established that Unity was partially responsible for its own injuries (which Unity denies), it would be for the jury to decide what *portion* of Unity's injuries were self-inflicted and what portion were causes by the August 13, 1980 *ex parte* Agreed Injunction Order.

In sum, the ambiguous statements contained in Unity's petition simply do not constitute the quantum of "clear proof" that is needed to establish on a Section 2-619 motion that defendants' illicit conduct played *no* part in causing Unity's injuries.

CONCLUSION

Plaintiffs respectfully submit that this Court was misled by defendants' characterization of their motion as attacking Unity's "standing" and, as a result of this confusion,

this Court improperly resolved the central factual issue in this case—the issue of proximate cause—in a Section 2-619 motion to dismiss. Alternatively, this Court improperly deprived Unity of an opportunity to develop the record and, as a result, misinterpreted the statements in Unity's administrative petition.

Unity has bitterly contested this case for over seven years. It would be highly inequitable to dismiss Unity's claims based on a superficial analysis of difficult and complex issues which improperly led this Court's to find, in a Rule 23 Order, that Unity had no real interest in this case. Unity respectfully requests that the December 11, 1987 Rule 23 Order be vacated, that the trial court's judgment be reversed, and that this cause returned to the trial court for a hearing on the merits.

Respectfully submitted,

/s/ ALAN MILLS
One of the attorneys for
intervening plaintiffs-appellants

James P. Chapman
Alan Mills
James P. Chapman & Associates, Ltd.
33 North Dearborn Street, Suite 930
Chicago, Illinois 60602
(312) 263-0789

APPENDIX K

(Letterhead Of)

State of Illinois
Appellate Court Second District
Elgin
60120

OFFICE OF THE CLERK
312-695-3750

Appeal from the Circuit Court of County of DuPage

Trial Court Number: 79MR257

THE COURT HAS THIS DAY, 01/19/88, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-87-0043

Corporate West Development, etc. v. Ill. EPA, etc.

Petition for Rehearing by Intervening Plaintiffs-Appellants is denied.
(Inglis, Lindberg, Reinhard, JJJ.)

LOREN J. STROTZ, Clerk

cc: James P. Chapman & Associates, Ltd.
Alan Mills
James P. Chapman, Esq.
Martin, Craig, Chester & Sonnenschein
Richard J. Kissel
Thomas B. Cassidy
Honorable Neil F. Hartigan
Michael J. Hayes
James Anthony Coghlan
Kathleen M. Smith

Gerald M. Gorski, Ltd.
Gerald M. Gorski
Ancel, Glink, Diamond, Murphy & Cope, P.C.
Marvin J. Glink, Esq.
Peregrine, Stime, Newman, Ritzman & Bruckner, Ltd.
Hartman E. Stime, Esq.
Keck, Mahin & Cate
James H. Ryan, Esq.
William C. Ives
Honorable James E. Ryan
Gretta Tameling, Asst. State's Atty.

pa

APPENDIX L

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of May, 1988.

Present: Thomas J. Moran, Chief Justice

Justice Daniel P. Ward	Justice Howard C. Ryan
Justice William G. Clark	Justice Ben Miller
Justice Joseph F. Cunningham	Justice John J. Stamos

On the third day of June, 1988, the Supreme Court entered the following judgment:

No. 66546

Corporate West Development, Inc.,

William Alter, Sheldon Simborg as Trustee of Unity Trust, Joseph Ash as Trustee of Family Unity Trust, Milton Levenfeld as Trustee of Davis Family Trust, Joseph Ash as Trustee of Rhonda, Michael, Harvey, Jonathan and Jennifer Trust, Joseph Ash Trustee of R.L.A., M.J.A., H.L.A., J.B.A., and J.S.A., Trust, partners in a partnership named Unity Ventures,

Petitioners

v.

Illinois Environmental Protection Agency, Michael Mauzy, Director of Illinois Environmental Protection Agency, County of DuPage, Village of Lisle, and Village of Woodridge,

Respondents

Petition for Leave to Appeal from Appellate Court
Second District — 2-87-0043 — 79MR257

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-seventh day of June, 1988.

/s/ JULEANN HORNYAK, Clerk
Supreme Court of the State of Illinois